**IN THE HIGH COURT OF HIMACHAL PRADESH SHIMLA**

**Regular Second Appeal No.400 of 2007.**
**Judgment Reserved on:27.09.2007**

**Date of decision: 11.10.2007.**

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**H.P. Housing and Urban Development Authority** ….**Appellant**

**Versus**

**Shri Mast Ram** ….**Respondent.**

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*Coram*

**The Hon'ble Mr.Justice Dev Darshan Sud,J.**

*Whether approved for reporting ?*[1]

**For the Appellant:** **Mr.Bhupender Gupta, Senior Advocate with Mr.Neeraj Gupta, Advocate.**

**For the Respondents: Ms.Seema Guleria, Advocate.**

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**Dev Darshan Sud,J.**

This is the plaintiff's second appeal against the concurrent findings of the two courts below. The plaintiff, instituted a suit against the respondent-defendant for permanent prohibitory injunction restraining him from raising any construction or making encroachment on land comprised in Khasra Nos.189/1/2 and 189/2, situated in Mauza Pateog, Tehsil and District Shimla, and for mandatory injunction directing him to

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[1] ***Whether the reporters of Local Papers may be allowed to see the judgement***?

move/demolish any construction or encroachment made on the suit land.

The trial Court, framed eight issues and on the crucial issue relating to the legal entitlement of the plaintiff for grant of relief, held that the plaintiff had not established his case as pleaded and therefore, suit was dismissed.

It is undisputed that the plaintiff and the defendant own lands which are adjacent to each other. The allegation of the plaintiff was that the defendant had purportedly narrowed the approach of a path leading to Block Nos.58, 60, 61 and 62 of apartments/flats constructed by the plaintiff rendering it impossible for the residents to drive their cars to the respective Blocks. In support of its case, the plaintiff placed on record Ex.PW-2/A, spot map/plan, Ex.PW-2/B, copy of letter dated 22.4.1998 addressed to the defendant calling upon him to remove the so called encroachment and Ex.PW-3/A Aks Sajara. The plaintiff examined PW-1. Chet Ram, who was posted as Kanungo with it, PW-2 Shri V.K. Bhan, who was working as Assistant Engineer and PW-3 Shri Lokinder Singh, who was a Patwari. PW-1, in his cross-examination admits that he cannot state as to whether any land has been encroached upon or not. PW-2, who purportedly prepared Ex.PW-2/A, admits that no revenue record was consulted by him at the time when he prepared

the so called spot map and that he cannot say anything about the ownership of the land encircled in red in the plan which purportedly is the encroachment. PW-3 is the Patwari who admits that no demarcation was carried out by him on the spot. The learned trial Court, after considering the evidence in detail and in the totality of the circumstances, held that no demarcation or plan had been prepared in accordance with the provisions of H.P. Land Revenue Act and proceeded to dismiss the suit.

One other fact needs to be noticed at this stage. During the pendency of the suit before the learned trial Court, the plaintiff moved an application under Order 23 Rule 1 and 3 of the Code of Civil Procedure for permission to withdraw the suit. According to the averments made in the application, there was a formal defect in the suit as no demarcation report had been placed and proved on the record. According to the plaintiff, revenue record was lying in the Settlement Office and as such it was not possible for the plaintiff to get the demarcation. This application was taken up for consideration by the learned Court on 28.8.2002. On that day, nobody was present on behalf of the plaintiff and the application was considered and dismissed with costs of Rs.500/-. It was held that no case has been made out for withdrawal.

The plaintiff appealed to the learned District Judge who dismissed the appeal holding that in the absence of evidence no relief could be granted. An application under Order 41 Rule 27 of the Code of Civil Procedure was made with a prayer that evidence in the nature of a demarcation report be allowed to be produced on the record of the case. This application was considered and dismissed by the learned Appellate Court holding that the purported report was not in accordance with the provisions of law. In the grounds of appeal a challenge had been made to the dismissal of the application under Order 23 Rule 1 and 3 of the Code of Civil Procedure pleading that such dismissal was illegal and against law.

The plaintiff is now in appeal in this Court and has also filed a composite application under Order 26 Rule 9 and Order 41 Rule 27 of the Code of Civil Procedure praying that a Commissioner may be appointed to demarcate the land in accordance with Chapter I-M of the High court Rules and Orders Volume-I to ascertain the encroachment of land if any.

I have heard learned counsel for the parties and have gone through the record.

Learned counsel for the plaintiff urges that non-consideration of the ground raised in the grounds of appeal before the learned District Judge

challenging the rejection of the application under Order 23 Rule 1 and 3 for withdrawal of the suit, by the trial Court is illegal and cannot be sustained. He submits that the discretion in rejecting the application was not exercised in accordance with well known principles of law.

He has placed reliance on a number of decisions; namely; ***Syed Sadeq Reza vs. Nawab Asaf Kader Syed, AIR 1931 Calcutta 268***, holding that the words "other sufficient grounds" include within its ambit withdrawal of the suit permitting the plaintiff to produce evidence which was not available with him at the time of hearing of the suit. He submits that the High Court of Allahabad in ***Sheo Kumar Dwivedi and others vs. Thakurji Maharaj Brijman and another, AIR 1959 Allahabad 463,*** has taken a similar view commending a liberal interpretation of the provisions. He also places reliance on ***Paira Ram and another vs. Ganesh Dass and others, AIR 1967 Punjab 237,*** holding that the object of Order 23 Rule 1 and 2 of the Code of Civil Procedure is to permit the plaintiff to have a fair trial on merits which can be rectified only by a de novo trial. The ratio of ***Duryodhan Jena vs. Satyabadi Samal and others, AIR 1986 Orissa 58,*** was also urged in support of the appellant's case.

The submission made by the learned counsel for the plaintiff cannot be accepted. The

judgment of the learned District Judge does not show that this point has been urged before him with seriousness or may have been abandoned. The learned District Judge notices that an application under Order 23 Rule 1 and 3 was moved by the plaintiff for withdrawing the suit which was rejected. In the points for determination urged in support of the grounds raised, the record indicates that this point has not been urged by the plaintiff-appellant. It is by now well settled that the court record cannot be controverted ***(See: State of Maharashtra*** *vs.* ***Ramdas Shrinivas Nayak and Another, (1982) 2 SCC 463, Poonam Lata*** *vs.* ***M.L. Wadhwan and Others, (1987)3 SCC 347*** and ***Bhagwati Prasad*** *vs.* ***Delhi State Mineral Development Corporation, (1990) 1 SCC 361)*** and if a point was raised for determination of the learned Appellate Court, the proper course of action should have been to approach that Court. This proposition of law is by now well settled. That apart, as held by the Hon'ble Supreme Court in **Deman Singh and Others vs. State of Punjab and Others, (1985)2 SCC 670,** a number of points are raised in the grounds of appeal, but are not urged. These cannot be allowed to be agitated in appeal. The Hon'ble Supreme Court has held:

> *"….No significance can be attached to the submission that several other questions were raised in the writ*

> *petition before the High Court but they were not considered. Parties and counsel usually raise innumerable grounds in the petitions and memoranda of appeal etc. but, later, confine themselves in the course of argument to a few only of those grounds. No party or counsel is thereafter entitled to make a grievance that the grounds not argued were not considered. If indeed any ground which was argued was not considered it shold be open to the party aggrieved to draw the attention of the court making the order to it by filing a proper application for review or clarification. … … …"*

This is the settled law and it is not for this Court to determine the point in appeal.

That apart, the cavalier manner in which the application has been pursued before the learned trial Court would itself show the seriousness with which the plaintiff was pursuing the case. Nobody appeared on behalf of the plaintiff before the learned trial Court on the date when the application was taken up for proceedings. No review was filed against the order of rejection.

On the other point raised by the learned counsel appearing for the appellant that the learned Appellate Court was in error in dismissing the application under Order 41 Rule 27 for

permission to lead additional evidence, I find that this rejection is in accordance with law as the Appellate Court, took into consideration the fact as to whether admitting such evidence would make any substantial difference to the case of the appellant. I have also considered the application moved by the appellant in the present appeal praying for appointment of Local Commissioner and leading additional evidence in the nature of such a report to be obtained by him. All that need be said is that the plaintiff seeks to have a trial de novo at every stage. At the trial stage, apart from the fact that no demarcation report was filed, no attempt to demarcate the land was made, the plaintiff also did not even think it fit to produce any of the residents of the four Blocks served by the road on which the defendant had purportedly made an encroachment in support of its contention that the road had in-fact been narrowed. No photographs or other evidence was presented before the trial Court for reasons best known to the plaintiff. Application under Order 23 Rule 1 and 3 was abandoned and not pursued with seriousness before the learned trial Court. Rather a feeble attempt was made to place on record a purported demarcation which did not meat the mandatory statutory requirements of the Himachal Pradesh Land Revenue Act. Now in second appeal, again an

attempt is made for gathering evidence afresh. This cannot be allowed.

Learned counsel appearing for the respondent has urged and rightly so that granting permission for withdrawal of suit at the appellate stage cannot be countenanced. She places reliance on ***Mangat Ram vs. Chura Dutt and another AIR 2003 HP 143*** and ***Siddagangappa vs. Thimmanna, AIR 2003 Karnataka 164,*** holding that no permission for withdrawal of the suit can be allowed when the suit was at its final stage. She also places reliance on ***Daulat Ram vs. Smt.Janki Devi and others, 1995(1) Sim.L.C.132*** and ***Shri Guru Maharaj Anandpur Ashram Trust, Guna and others vs. Chander Parkash and others, AIR 1986 Punjab and Haryana 399.***

On a consideration of the judgment of both the Courts below, I find that they have concurrently held the plaintiff's failure to establish his case and rightly dismissed the suit. Having failed to prove his case, the plaintiff cannot be allowed to convert the first and the second appeal proceedings into a trial de novo. The production of evidence in favour of his case was the primary duty of the plaintiff which admittedly has not been discharged by the appellant-plaintiff. No question of law much less substantial question of law arises for determination of the case in this appeal which is

accordingly dismissed. There shall be no order as to costs.

**October 11, 2007.** **(Dev Darshan sud)**
**(aks)** **Judge.**